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THE HYPOCRISY OF *ALDEN V. MAINE*: JUDICIAL REVIEW, SOVEREIGN IMMUNITY AND THE REHNQUIST COURT

*Erwin Chemerinsky**

When constitutional historians look back at the Rehnquist Court, they undoubtedly will say that its most significant changes in constitutional law were in the area of federalism. The Rehnquist Court has dramatically changed the law in three ways. First, it has narrowed the scope of Congress's authority under the Commerce Clause and under Section 5 of the Fourteenth Amendment.¹ Second, it has revived the Tenth Amendment as a limit on Congress's powers to regulate state governments.² Finally, it has granted state governments much greater immunity from suits.³ Virtually all of these decisions have been by five to four margins, with the majority comprised of the five most conservative Justices on the Court: Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and

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1. See, e.g., *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); see also *United States v. Morrison*, 169 F.3d 820 (4th Cir. 1999), cert. granted 120 S. Ct. 11 (1999); *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999), cert. granted, 120 S. Ct. 494 (1999).

2. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). But see *Reno v. Condon*, 120 S. Ct. 666 (2000) (rejecting Tenth Amendment challenge to the Drivers' Privacy Protection Act).

3. See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Thomas.⁴ The four more moderate Justices—Stevens, Souter, Ginsburg, and Breyer—have dissented in almost all of these cases.

The ideological split among the Justices in cases involving issues of federalism is not surprising. Throughout American history, there has been a great ideological divide over federalism. Consistently, conservatives have emphasized states rights in opposing federal efforts ranging from abolition of slavery to Reconstruction to progressive legislation protecting workers to the New Deal to the civil rights movement. Consistently, liberals have argued that concern over state government prerogatives should not preclude desirable federal government actions.

What is surprising about the Supreme Court's recent federalism decisions is how far the conservative majority is willing to go in protecting state governments from suit to enforce federal law. The Court has held that even a person with a federal right, including a property right, is barred from suing a state government for redress. It also is surprising, indeed I'd say shocking, as to how far the Court is willing to go in approving complete preclusion of all judicial jurisdiction for individuals with claims against state governments.

A simple example illustrates. Imagine a hypothetical law professor who has published a couple of books often used by law students. Imagine that a state university decides to reproduce the books and sell them at less than the publisher's price. Imagine further that this law professor is saving the royalties for his hypothetical four children's college education. Under the Supreme Court's 1999 federalism decisions, the professor cannot sue the state university in state or federal court for redress.⁵ The professor can sue individual state officials, especially for injunctive relief to stop future

4. Decided by this margin were *Kimel v. Florida Board of Regents*, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, *Printz v. United States*, *Seminole Tribe v. Florida*, and *United States v. Lopez*.

5. See *Alden v. Maine*, 119 S. Ct. 2240 (1999) (barring suits against state governments in state court without their consent); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999) (barring suits against state governments for patent infringement in federal court without their consent).

violations, but no suit whatsoever can be brought against the state university to regain the royalties.⁶

Why provide state governments such immunity to violate people's rights and avoid paying damages for the injuries they inflict? In this Essay, I want to examine how the Supreme Court has answered this question. My thesis is that the Court has made a value choice that protecting the rights of state governments is more important than protecting the rights of individuals. I believe that the Court not only has failed to justify this value choice, but that it disingenuously tries to pretend that it is not making a value choice at all. Moreover, I contend that this value choice is wrong under the United States Constitution.

Part I of this Essay argues that the Court's decisions according state governments immunity from suit can only be understood as a value choice by the conservative Justices to favor state governments over individual rights. I will focus especially on *Alden v. Maine*⁷ and argue that the Court's ruling cannot be understood as a product of its interpretation of the text or history of the Constitution. Indeed, the Court violates the principles of interpretation that it repeatedly has professed. The decision is entirely a result of a value choice that the Court has made to protect state governments at the expense of individuals.

I focus primarily on *Alden v. Maine* for several reasons. Until *Alden*, it always was thought that according a state Eleventh Amendment immunity meant that a suit against the state would need to go forward in state rather than federal court. *Alden* is a dramatic change in the law because it means that no judicial forum, state or federal, is available for suits against state governments. Also, the Court's Eleventh Amendment decisions at least purport to interpret a textual constitutional provision. *Alden* is remarkable because the Court recognizes a principle nowhere stated in the Constitution, state sovereign immunity in state court, and allows it to take precedence over constitutional provisions such as the supremacy of federal law and due process.

6. The inadequacy of suits against individual officers is discussed *infra* in Part III.

7. 119 S. Ct. 2240 (1999).

Part II of this Essay then contends that the Court has failed to justify its value choice. Nothing in the Court's opinion explains why state immunity is entitled to greater weight under the Constitution than the rights of individuals.

Part III concludes by arguing that the Court has made the wrong value choice in light of the Constitution's structure and commitment to limiting government power. Specifically, I argue that both the Supremacy Clause and the Due Process Clause explain why states should not be accorded immunity from suits in their own courts.

The Court's rulings in cases like *Alden v. Maine*, *Florida Prepaid v. College Savings Bank*, and *Kimel v. Florida Board of Regents* will have a profound effect on people's lives. States can inflict great injuries—by ignoring federal labor laws, by violating copyrights and patents, by discriminating based on age—and nowhere be held accountable. These decisions are the height of judicial hypocrisy. The five most conservative Justices who profess the need for judicial restraint in cases involving individual rights disregard this completely in protecting state governments from suit. No matter how much the Court pretends otherwise, the cases are nothing more than a value choice to favor state government power over individual rights. This is a value choice that the Justices never justify and, I believe, cannot possibly justify.

I. THE HYPOCRISY OF *ALDEN V. MAINE*:

THE INABILITY TO EXPLAIN THE RULING BASED ON CONSERVATIVE INTERPRETIVE METHODOLOGY

In recent years, the Supreme Court has consistently rejected requests that it recognize additional fundamental rights under the Constitution. In these cases, the Court has explained the need for judicial restraint and proclaimed that a right should be judicially protected only if it is stated in the Constitution's text, clearly intended by the Constitution's Framers, or supported by an unbroken tradition of protecting liberty. For example, in *Bowers v. Hardwick*,⁸ the Court rejected a claim that privacy protects a right for consenting adults, in their own bedroom, to engage in homosexual activity. Justice White, writing for the majority, explained that the right could not be

8. 478 U.S. 186 (1986).

justified based on the Constitution's text or intent or a tradition of protection for homosexual activity. Justice White wrote:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.⁹

More recently, in *Washington v. Glucksberg*,¹⁰ the Court held that there is not a constitutional right to physician-assisted suicide. The Court again professed the need for great judicial restraint in protecting rights not stated in the Constitution:

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.¹¹

The Court said that in deciding whether rights are protected by the Due Process Clause it follows an established methodology:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed

9. *Id.* at 194-95.

10. 521 U.S. 702 (1997).

11. *Id.* at 720 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and citing *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)) (citations omitted).

that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.¹²

Compare, then, the approach proclaimed by the Court in these cases with its method in *Alden v. Maine*.¹³ In *Alden*, the Court held that a state cannot be sued in state court without its consent. Justice Kennedy, writing for the majority, declared: "We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."¹⁴

Can *Alden's* protection of rights for state governments be justified under the methodology followed in cases such as *Bowers* and *Glucksberg*? The text of the Constitution is silent as to whether states can be sued in state court. The Eleventh Amendment, the only constitutional provision concerning immunity, provides that federal courts may not hear suits against states by citizens of other states or citizens of foreign countries. Although it has been extended to bar suits against states by their own citizens,¹⁵ there is nothing in the Amendment that even hints at precluding suits against states in state courts. This is not surprising because the purpose of the Eleventh Amendment was to strike out a specific clause of Article III of the Constitution, which authorized suits against states by citizens of other states and citizens of foreign countries that had been relied on by the Supreme Court in *Chisholm v. Georgia*.¹⁶

12. *Id.* at 720-21 (citations omitted) (quoting *Moore*, 431 U.S. at 503, and citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"); also quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993), and citing *Collins*, 503 U.S. at 125, *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 277-78 (1990)).

13. 119 S. Ct. 2240 (1999).

14. *Id.* at 2246.

15. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that state governments may not be sued by their own citizens in federal court).

16. 2 U.S. (2 Dall.) 419 (1793). See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1926-39 (1983); William A. Fletcher, *A Historical Interpretation*

Justice Kennedy makes a textual argument by stating that the existence of states is mandated by the Constitution. He writes: "[T]he founding document 'specifically recognizes the States as sovereign entities.' . . . Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance."¹⁷

Yet, the fact that the Constitution preserves states as entities says absolutely nothing about whether states should have immunity in state court. The Constitution, of course, recognizes the existence of state governments, but that does not give any indication of the scope of state power or the existence of state immunity.

Nor can the Framers' intent be used as a basis for providing states' immunity from suit in state courts. There is no indication that the Framers discussed the issue of the ability to sue state governments in state courts either at Philadelphia or at the state ratifying conventions. There was discussion about the ability to sue states in *federal* court, but no known mention of whether states can be sued in state court. It is notable that in his majority opinion, Justice Kennedy quotes from Hamilton and Madison as to how states retained their immunity to suit.¹⁸ However, both of these statements were about whether states could be sued in federal court in light of the language of Article III of the Constitution. It is notable that when Justice Kennedy broadly proclaims "the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified," the authority he cites is Justice Iredell's lone dissent in *Chisholm*.¹⁹

of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1063 (1983) (arguing that the Eleventh Amendment only prevents suits against states based solely on diversity jurisdiction).

17. *Alden*, 119 S. Ct. at 2247 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 71 (1996) and *Printz v. United States*, 521 U.S. 898, 919 (1997)).

18. *See id.* at 2248-49.

19. *Id.* at 2248. *See Chisholm*, 2 U.S. (2 Dall.) at 434-35 (Iredell, J., dissenting) ("I believe there is no doubt that neither in the State now in question, nor in any other in the *Union*, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed.").

Justice Kennedy recites at great length the history of the ratification of the Eleventh Amendment as showing the commitment of the Framers to sovereign immunity.²⁰ Yet, all of these quotations concern the immunity of states to suit in federal court. He assumes that the states' desire for immunity to suit in federal court means that the states sought immunity from suit in all courts. This does not necessarily follow. States could have been very distrustful of the new entity of federal courts, but had no reason for distrust of suits in their own courts.

Indeed, Justice Kennedy expressly acknowledges that the Framers were silent on the ability to sue state governments in state courts. Justice Kennedy invokes this silence as key evidence of the Framers' intent. He writes:

We believe, however, that the founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States' war-time debts, together with the well known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.²¹

The problem with this argument is that silence is inherently ambiguous. Perhaps Justice Kennedy is correct that the Framers were silent because they thought it obvious that states could not be sued in state court. Alternatively, maybe they were silent in that they thought it clear that states could be sued in state court. Most likely, though, the Framers were silent because the issue did not come up and they never thought about it. If the interpretive methodology the Court follows is that set out in cases like *Bowers* and *Glucksberg*, a right should be protected based on the Framers' intent only if it is clear that is what the drafters desired. Silence is inherently uncertain and a highly questionable basis for knowing intent.

20. See *Alden*, 119 S. Ct. at 2246-57.

21. *Id.* at 2260.

Indeed, as Justice Souter reviews in dissent, there was no consensus among the Framers as to the scope and protections of state sovereign immunity. Justice Kennedy can invoke a few quotations to support his position, but in doing so he has to ignore many other statements rejecting state sovereign immunity. Justice Souter explained:

There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing, to the ratification controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common-law power defeasible, like other common-law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common-law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position.²²

Finally, in *Bowers*,²³ *Glucksberg*,²⁴ and other cases the Court has spoken of tradition being a basis for protecting rights.²⁵ Is there any tradition of safeguarding states from suit when they are sued in state court? Justice Kennedy describes none. In fact, on many occasions prior to *Alden*, the Supreme Court said that a state's sovereign immunity protected it from suit in federal but not state court.²⁶ Justice Kennedy explains why these cases never really resolved the

22. *Id.* at 2271 (Souter, J., dissenting).

23. See *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986).

24. See *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997).

25. See *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 681 (1996); *Planned Parenthood v. Casey*, 505 U.S. 833, 951 (1992); see also, Erwin Chemerinsky, *Symposium, History, Tradition, The Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901 (1993).

26. See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-05 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-40 n.2 (1985); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 418-21 (1979).

question of whether states could be sued in state court. But they certainly never hinted that states had immunity to suit in state court, and all assumed that states could be sued there.

Alden v. Maine creates a broad new right for state governments. Yet, the Court's methodology is at odds with what it professed in cases such as *Bowers* and *Glucksberg*: the text, the Framers, and tradition all are silent about the ability to sue states in state court.

The argument might be made, of course, that states' rights are different from individual rights. Justice Kennedy makes this argument in two ways. One is his claim that states had immunity to suit prior to the ratification of the Constitution and that therefore they retained this after the Constitution was adopted. Justice Kennedy writes: "[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."²⁷

However, there are many problems with this argument. First, it is not at all clear that states possessed such immunity before the Constitution was adopted. As Justice Souter explains in dissent:

The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; "antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states," . . . Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue and be sued.²⁸

Second, the argument seems to be that the states had sovereign immunity, that the states ratified the Constitution, and that therefore the states kept their sovereign immunity. But long ago, in *McCulloch v. Maryland*,²⁹ the Supreme Court rejected this claim for state sovereignty. Chief Justice John Marshall declared that "the government proceeds directly from the people; is 'ordained and established'

27. *Alden v. Maine*, 119 S. Ct. 2240, 2246-47 (1999).

28. *Id.* at 2271 (Souter, J., dissenting) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 207, 149 (5th ed. 1891)).

29. 17 U.S. (4 Wheat.) 316 (1819).

in the name of the people.”³⁰ Throughout American history, the Supreme Court has rejected the idea that states created the federal government and therefore have any power over it. Yet, that is exactly what *Alden* creates: states can violate federal law and nowhere be held accountable.

In fact, in *McCulloch*, the Supreme Court expressly rejected the idea that state prerogatives possessed before the Constitution was adopted could be used to trump the Constitution’s requirements. Chief Justice Marshall wrote:

We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted, that the government of the Union was not sovereign, with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme?³¹

In *Gibbons v. Ogden*,³² another key early Supreme Court decision concerning federalism, the Supreme Court went even further and expressly rejected the idea that states retained powers that they possessed before ratification of the Constitution. Once more it was Chief Justice John Marshall who declared:

[R]eference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a

30. *Id.* at 403.

31. *Id.* at 410.

32. 22 U.S. 1 (1824).

Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change³³

Third, the primary problem with Kennedy's argument is that it has a principle nowhere found in the Constitution. Sovereign immunity means that a state cannot be sued for violating the Constitution and laws made pursuant to it. *Alden* means that the Constitution is subordinate to the principle of state sovereign immunity. This is inconsistent with the Constitution's declaration in Article VI that it, and laws and treaties made pursuant to it, is the supreme law of the land.³⁴ Even if Justice Kennedy is correct that states had sovereign immunity prior to the ratification of the Constitution, the adoption of the Constitution makes it supreme and does not justify the broad principle of immunity the Court announces in *Alden*.

The other argument that Justice Kennedy makes is based on the structure of the Constitution. The claim is that the holding in *Alden* is justified by the structure of the Constitution in a way that the rights claimed in *Bowers* and *Glucksberg* could not be justified. Justice Kennedy emphasizes the structure of the Constitution in explaining why states cannot be sued without their consent:

[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.³⁵

33. *Id.* at 187.

34. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."). It might be argued that the supremacy of federal law is ensured in other ways, such as suits by the United States or suits against state officers. The inadequacy of these mechanisms for ensuring the supremacy of federal law is discussed in Part III.

35. *Alden v. Maine*, 119 S. Ct. 2240, 2254 (1999) (citations omitted).

Again, there are serious problems with this argument. First, the basis for finding sovereign immunity in the structure of the Constitution is unclear. Why is it "implicit in the constitutional design?" The argument seems remarkably like Justice Douglas finding privacy in the penumbra of the Bill of Rights, something conservatives long have criticized.³⁶ The structure of the Constitution is almost exclusively about the federal government. The few provisions concerning state governments do not say or imply anything about sovereign immunity.

Second, Justice Kennedy's structural argument again ignores the Supremacy Clause. A key structural aspect of the United States Constitution is its declaration that it, and laws and treaties made pursuant to it, is the supreme law of the land.³⁷ How can the supremacy of federal law be assured and vindicated if states can violate the Constitution or federal laws and not be held accountable? The probation officers in *Alden* have a federal right to overtime pay, but there is no way of forcing the states to meet their federal obligation. College Savings Bank has a federal patent right that was allegedly infringed by the State of Florida, but there is no way to hold it liable for patent infringement. In other words, the states are left free to disregard federal law.

At oral argument in *Alden*, Seth Waxman, the Solicitor General of the United States, quoted to the Court from the Supremacy Clause of Article VI and contended that suits against states are essential to assure the supremacy of federal law.³⁸ Justice Kennedy's response to this argument is astounding. He states:

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obliga-

36. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also Robert G. Dixon, Jr., *The 'New' Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 84 (stating that in *Griswold*, Douglas "skipped through the Bill of Rights like a cheerleader—'Give me a P . . . give me an R . . . give me an I . . .,' and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right").

37. See U.S. CONST. art. VI, cl. 2.

38. See *Alden v. Maine*, No. 98-436, 1999 WL 216178 (U.S. Oral. Arg., Mar. 31, 1999).

tions imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.' U.S. Const., Art. VI.³⁹

What, then, is the assurance that state governments will comply with federal law? Trust in the good faith of state governments? Is it possible to imagine that thirty or forty years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to voluntarily comply with federal law? James Madison said that if people were angels there would be no need for a Constitution, but there would be no need for a government either.⁴⁰ The reality is that state governments, intentionally or unintentionally, at times will violate federal law. To rely on trust in the good faith of state governments is no assurance of the supremacy of federal law at all.

My point in this section has been that the Court's decision in *Alden v. Maine* cannot be seen as a product of an interpretive theory that the Justices in the majority are willing to apply in other constitutional cases, particularly those involving individual rights. *Alden's* conclusion that state governments cannot be sued in state court without their consent cannot be justified based on the text, the Framers' intent, tradition, or the structure of the Constitution.

II. *ALDEN* AS A VALUE CHOICE TO FAVOR STATE GOVERNMENTS OVER INDIVIDUALS

That *Alden* cannot be justified by the methodology used in *Bowers* or *Glucksberg* does not show that *Alden* was wrongly decided.

39. *Alden*, 119 S. Ct. at 2266.

40. See THE FEDERALIST NO. 51, at 262 (James Madison) (Bantam Classic ed., 1982) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls [sic] on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul [sic] the governed; and in the next place, oblige it to controul [sic] itself.").

Indeed, as one who criticizes the methodology and results in *Bowers* and *Glucksberg*, I cannot maintain that the Court's failure to use their approaches shows that *Alden* was incorrect. However, demonstrating that *Alden* cannot be justified by the conservative Justices' usual approach to constitutional interpretation shows that what really occurred in *Alden* is that the Court's majority made a value choice to favor state governments over individuals.

Ultimately, the issue in *Alden* is whether people with federal law claims against state governments should have a judicial forum available. The choice that must be made is whether to favor state governments' immunity or state governments' accountability. The Court pretends that it is avoiding making such a value choice by pointing to external sources as compelling its decision: the text, the historical background, and the structure of the Constitution. But the above discussion shows that these sources are equivocal at best and more likely, strongly supportive of allowing states to be sued. Therefore, the Court's decision cannot be seen as a value neutral following of a method of constitutional interpretation. The Court in *Alden* is making a choice to favor state governments over individuals.

Actually, this is true in all of the Court's Eleventh Amendment decisions. The text of the provision only bars suits against states by citizens of other states; it says nothing about suits against a state by its own citizens.⁴¹ Scholars such as William Fletcher and John Gibbons painstakingly reviewed the history of the Eleventh Amendment and persuasively demonstrated that it was meant to bar only suits based on diversity jurisdiction against state governments.⁴² The Court's interpretation of the Eleventh Amendment is a choice to prefer state immunity rather than state accountability.

What is particularly troubling is that the Court does not acknowledge or defend this value choice. Instead, the Court makes it

41. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that state governments may not be sued by their own citizens in federal courts). For a criticism of *Hans*, see David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 70 (1984).

42. See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

seem that no balancing is occurring at all—that the Court is just discovering state immunity in the history and structure of the Constitution. The key question which the Court must answer, and never does, is why, as a matter of constitutional values, state immunity deserves precedence over state accountability.

Justice Kennedy's majority opinion, at one point, suggests a value served by preventing suits against state governments: protecting state treasuries. Justice Kennedy writes:

Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.⁴³

This concern underlies all of the Court's sovereign immunity decisions. Allowing states to be sued in federal or state court means that states can be held liable and the ultimate cost is to the taxpayer.

This argument, however, is incomplete to support the Court's holding. The Court also needs to explain why protecting the state treasury deserves more weight than allowing those injured by state governments to sue. There is a conflict between two values—immunity to protect state treasuries and the desire to hold state governments accountable for their violations of federal law. The Court briefly identifies the former value, but never explains why it is the more important of the two.

Alden perhaps is best understood as the Court's reviving *National League of Cities v. Usery*⁴⁴ under a different guise. In *National League of Cities*, the Supreme Court held that it violated the Tenth Amendment for Congress to apply the Fair Labor Standards Act to state and local governments. The Court declared unconstitutional the application of the Fair Labor Standards Act, which required the payment of the minimum wage, to state and local employees. The Court found that requiring states to pay their employees the minimum wage violated the Tenth Amendment because the law "operate[s] to directly displace the States' freedom to structure integral

43. *Alden*, 119 S. Ct. at 2264.

44. 426 U.S. 833 (1976).

operations in areas of traditional governmental functions.”⁴⁵ The Court explained that forcing state and local governments to pay their employees the minimum wage would require that they either raise taxes or cut other services to pay these costs.⁴⁶ The Court said that this would displace decisions traditionally left to the states and “may substantially restructure traditional ways in which the local governments have arranged their affairs.”⁴⁷

In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*,⁴⁸ the Supreme Court expressly overruled *National League of Cities*. The Court held that applying the Fair Labor Standards Act to state and local governments does not violate the Tenth Amendment.

Alden effectively overrules *Garcia* and reinstates *National League of Cities*. The Fair Labor Standards Act constitutionally still applies to state and local governments, but no state can be sued by an individual for violating it. The same concern for protecting state treasuries was voiced in both *National League of Cities*⁴⁹ and *Alden*.⁵⁰

There are several troubling aspects to the Court’s approach. By not actually overruling *Garcia*, the Court did not eliminate a federal right that individuals have to be paid overtime pay by all employers, including state governments. Instead, the Court’s decision means that state employees have a federal right, but no remedy is available to them. This violates a basic principle of law expressed long ago in *Marbury v. Madison*:⁵¹ “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”⁵²

If the Court had overruled *Garcia* it would have denied overtime pay to state employees, but it would not have prevented plaintiffs with other federal rights from gaining relief from state governments. Consider a person who has a patent or copyright. The individual

45. *Id.* at 852.

46. *See id.* at 849-50.

47. *Id.* at 849.

48. 469 U.S. 528 (1985).

49. *See National League of Cities*, 426 U.S. at 846-49.

50. *See Alden v. Maine*, 119 S. Ct. 2240, 2250 (1999).

51. 5 U.S. (1 Cranch) 137 (1803).

52. *Id.* at 163.

unquestionably has a federal property right. If the Court in *Alden* had ruled that the Tenth Amendment bars application of the federal Fair Labor Standards Act to the states, a person with a patent or copyright claim still could sue a state government for infringement in state court. The Court's decision in *Alden* means, though, that a person with a copyright or patent infringement claim against a state government has no forum for redress. The Court's decision in *Florida Prepaid v. College Savings Bank*⁵³ means that the suit is barred in federal court by the Eleventh Amendment.⁵⁴ *Alden* holds that a state cannot be sued in state court.

Thus, the protection the Court accords state governments in *Alden* is much greater than finding that certain laws cannot be constitutionally applied to the states. *Alden* means that state governments can never be sued in state court without their consent. In every situation where the Eleventh Amendment applies, this means that no judicial forum is available. Previous to *Alden*, it was always thought that a finding of Eleventh Amendment immunity meant that the case had to be brought in state rather than federal court. *Alden*'s impact is that no judicial forum, federal or state, will be available. What is so disturbing about *Alden* is that the Court has made a basic value choice to favor state governments over individuals and never justified, and hardly even acknowledged, that it was making such a judgment.

III. WHY THE COURT'S VALUE CHOICE WAS WRONG: STATE ACCOUNTABILITY IS MORE IMPORTANT THAN STATE IMMUNITY

Thus far, I have argued that whether state governments should be accorded sovereign immunity in their own state courts cannot be determined by the text, the Framers' intent, history, tradition, or the structure of the Constitution. Each of these sources can be invoked equally persuasively on either side of the question. A value choice must be made as to which is more important—state immunity or state accountability.

53. 119 S. Ct. 2199 (1999).

54. *See id.* at 2205.

In this section, I argue that the Supreme Court has made the wrong value decision in preferring state immunity over state accountability. There are two reasons why states should be amenable to suit in their state courts: ensuring the supremacy of federal law and providing due process for those who are deprived life, liberty, or property. I argue that each of these outweighs the interest in protecting state treasuries from damage awards.

A. The Supremacy of Federal Law

The federal Fair Labor Standards Act applies to the states and gave the probation officers in *Alden v. Maine*⁵⁵ a federal right to overtime pay.⁵⁶ Similarly, in *Florida Prepaid v. College Savings Bank*,⁵⁷ the plaintiff, College Savings Bank, has a federal patent and all of the rights accompanying it, including against state governments.⁵⁸ If state governments can disregard federal law, then no longer is federal law supreme. If state governments cannot be sued, how can the supremacy of federal law be assured? As discussed earlier, Justice Kennedy's explicit answer in *Alden* was that trust in the good faith of state governments is sufficient to ensure the supremacy of federal law.⁵⁹ This hardly seems an adequate assurance of the supremacy of federal law. Indeed, state governments are encouraged by the Supreme Court's decisions to violate federal law because they know that they cannot be sued for violations. For instance, not long ago, I was preparing material for a speech at a state judicial conference and told the state coordinator that I would get appropriate copyright releases. He responded that after the Supreme Court's decisions in June, they don't worry about that any more because they know they can't be sued. Broad immunity often will be interpreted as license to violate federal laws.

There are two steps to the argument that the supremacy of federal law justifies allowing state governments to be sued. First, the supremacy of federal law is a basic constitutional value and

55. 119 S. Ct. 2240 (1999).

56. *See id.* at 2246.

57. 119 S. Ct. 2199 (1999).

58. *See id.* at 2201.

59. *See Alden*, 119 U.S. at 2266. *See supra* notes 39-40 and accompanying text.

outweighs the desire to protect state treasuries. Second, damage suits against state governments is essential in order to ensure the supremacy of federal law.

The importance of ensuring supremacy of federal law was articulated by the Supreme Court long ago in *McCulloch v. Maryland*.⁶⁰ Chief Justice John Marshall declared: "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."⁶¹ Chief Justice Marshall elaborated on the importance of ensuring supremacy of federal law:

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing [sic] in the constitution or laws of any State to the contrary notwithstanding."⁶²

The question is whether suits against state governments are necessary to ensure the supremacy of federal law. There are two alternative mechanisms that might be pointed to as adequate substitutes for suits against the states. One is the possibility of the United States government suing the state. State sovereign immunity does not bar

60. 17 U.S. (4 Wheat.) 316 (1819).

61. *Id.* at 426.

62. *Id.* at 405-06.

suits by the United States government against state governments.⁶³ For example, the United States Department of Labor may sue state governments for violating the federal Fair Labor Standards Act and could bring suit on behalf of the probation officers in Maine. The argument is that this is sufficient to ensure the supremacy of federal law.

At the very least, this argument applies only in the relatively few instances in which the federal government can bring suits on behalf of individuals against state governments. For the vast majority of federal laws, the federal government has no authority to sue on behalf of individuals. For example, when the federal government brought suit on behalf of individuals who were institutionalized by state governments and whose rights allegedly were being violated, the federal courts ruled that the federal government lacked standing.⁶⁴

Consider the rights of the patent holders in *Florida Prepaid*. The federal government has no authority under federal law to sue on behalf of the individual patent holders. Nor would the federal government be accorded standing if it brought suit. If the patent holders cannot sue in federal or state court—and the Supreme Court's recent decisions mean that both forums are not available—then there is no way to ensure the supremacy of federal patent law over the states.

Moreover, even in the limited areas where the federal government may sue on behalf of individuals, this is insufficient to ensure the supremacy of federal law. Federal agencies, such as the Department of Labor, have very limited prosecutorial resources. They are not able to sue on behalf of very many individuals whose federal rights have been violated. In all other instances, state governments are able to get away with violating federal law; in all of these situations, federal law no longer is supreme over the states. States knowing of the unlikelihood of federal suit can violate federal law with little chance of being held accountable. Practically, states are supreme over federal law.

63. See, e.g., *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 646 (1892).

64. See, e.g., *United States v. Mattson*, 600 F.2d 1295, 1299-1300 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121, 1125-26 (4th Cir. 1977).

The other mechanism for holding states accountable is suits against state officers. Although state governments cannot be sued, state government officials can be sued.⁶⁵ State officers can be sued for injunctive relief⁶⁶ and state officers can be sued for money damages to be paid out of their own pocket.⁶⁷ Although such suits are important in ensuring the supremacy of federal law, they are inadequate and do not replace the ability to sue state governments.

Injunctive relief obviously can prevent future violations, but it does nothing to provide redress for past infringements. The probation officers in *Alden* can sue for an injunction to ensure that they are paid overtime in the future, but that does nothing to provide them a remedy for the prior violations of their rights under the federal Fair Labor Standards Act. College Savings Bank might get an injunction against state officers to protect their patents from future infringements by the State of Florida, but that gives them no remedy for past wrongful actions. For all of the states' violations of federal law that occurred prior to the injunction, and for many reasons they could be extensive and impose great harm, the supremacy of federal law is undermined.

Nor are suits against state officers for money damages a substitute for litigation against state governments. Some state officers have absolute immunity to suits for money damages, such as judges, prosecutors, and legislators.⁶⁸ Consider, for example, a claim that state court judges are systematically violating criminal defendants' rights, such as by racism in setting bail or by paying criminal defense attorneys too little to protect defendants' Sixth Amendment rights.⁶⁹ Who can be sued in such an instance? The state government cannot

65. See *Ex parte Young*, 209 U.S. 123, 124 (1908). Actually, several earlier cases had held similarly that the Eleventh Amendment did not preclude suits against state officers. See, e.g., *Tindal v. Wesley*, 167 U.S. 204, 221 (1897); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857-59 (1824). The ability to sue state officers in federal court is discussed in ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 411-31 (3d ed. 1999).

66. See *Ex Parte Young*, 209 U.S. at 155-56.

67. See *id.* at 189.

68. See CHERMERINSKY, *supra* note 65, at 500-12 (reviewing cases providing absolute immunity to these officers).

69. See *O'Shea v. Littleton*, 414 U.S. 488, 491 (1974) (declaring nonjusticiable a suit contending that the defendants, a magistrate and a judge, discriminated against blacks in setting bail and imposing sentences).

be named as a defendant in federal or state courts. State judges cannot be sued for damages or for injunctive relief because of a federal law that expressly bars such suits.⁷⁰ It seems that no suit could be brought, even though there is an allegation of a serious violation of a basic constitutional right.

State government officials who do not have absolute immunity all have qualified immunity, which often makes recovery for violations of federal law impossible. The Supreme Court has held that government officials can be held liable only if they violate a clearly established right that a reasonable officer should know.⁷¹ The result is that injured individuals often have no recourse except to sue the government entity. Without such litigation, the supremacy of federal law often cannot be protected. Again, *McCulloch v. Maryland* is instructive:

It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.⁷²

B. Due Process of Law

A separate reason why state accountability is more important than state immunity is providing due process of law. If a state government violates a person's life, liberty, or property, due process requires a remedy. As quoted above, this was Chief Justice John Marshall's point when he declared that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."⁷³

On many occasions, the Supreme Court has recognized that the absence of any court, state or federal, raises a serious due process issue.⁷⁴ In a long line of cases, the Court has said that because due

70. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996).

71. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

72. *McCulloch*, 17 U.S. (4 Wheat.) at 427.

73. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

74. See, e.g., *Oestereich v. Selective Serv. Sys.*, 393 U.S. 233, 243 n.6 (1968) (Harlan, J., concurring); see also Richard H. Fallon, Jr., *Some Confu-*

process requires a judicial forum, it would interpret federal laws that appeared to preclude all jurisdiction as not doing so. For example, in *Johnson v. Robison*,⁷⁵ the Court refused to interpret a statute limiting review of Veterans Administration decisions in a manner that would have foreclosed all judicial review.⁷⁶ The statute provided: "[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no official or any court of the United States shall have power or jurisdiction to review any such decision"⁷⁷

The Court observed that there would be a "serious question" about the constitutionality of this provision if it precluded all review.⁷⁸ As a result, the Court allowed a lawsuit to go forward by a conscientious objector who performed alternative service and sought educational benefits that had been denied by the Veterans Administration.⁷⁹

Similarly, in *Oestereich v. Selective Service System Local Board No. 11*,⁸⁰ the Court narrowly interpreted a provision limiting review of Selective Service decisions.⁸¹ During the 1960s, the Selective Service Commission retaliated against students involved in anti-Vietnam War protests by revoking their student deferments and classifying them as ready for induction.⁸² After the federal courts held that this was impermissible and enjoined the Selective Service Commission, Congress responded by adopting a statute limiting judicial review. The Act provided that "[n]o judicial review shall be made of the classification or processing of any registrant . . . except

sions About Due Process, Judicial Review, and Constitutional Remedies, 93 COLUM. L. REV. 309, 355-66 (1993) (arguing that the issue of whether there is a constitutional right to judicial review depends on the underlying substantive law).

75. 415 U.S. 361 (1974). See also *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (refusing to find statute to preclude review of a claim by an employee of the CIA who alleged that he was fired because he was a homosexual).

76. See *Johnson*, 415 U.S. at 373-74.

77. 38 U.S.C. § 211(a) (1982).

78. *Johnson*, 415 U.S. at 366.

79. See *id.* at 386.

80. 393 U.S. 233 (1968).

81. See *id.* at 237.

82. See *id.* at 234-35.

as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction”⁸³ The statute appeared to limit challenges to its validity to two contexts: defenses to a criminal prosecution and *habeas corpus*.

The Court, however, allowed an individual to bring suit to challenge the legality of his reclassification. Justice Harlan, in a concurring opinion, stated that “[i]t is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims.”⁸⁴

In many other cases as well, the Court emphasized that due process requires a judicial forum, and interpreted statutes to permit jurisdiction even though they contained language appearing to foreclose a judicial forum.⁸⁵ Those deprived of life, liberty, or property by a state government must be able to receive due process.

However, the Court’s recent sovereign immunity decisions mean that there will be many instances in which individuals will be injured without having any judicial forum available. The probation officers in Maine have a federal property right to overtime pay,⁸⁶ but there is no way for them to get due process. College Savings Bank has a federal property right in its patent, but it cannot get any due process; federal and state judicial forums are both closed to it.

The argument might be made that protecting state treasuries is more important than upholding the Due Process Clause. This, though, seems clearly wrong because the whole point of the Constitution is to limit government power.⁸⁷ To allow a government to deny life, liberty, or property without due process is to negate a basic constitutional protection and, indeed, the central mission of the Constitution itself. Yet, the Court’s recent sovereign immunity decisions mean that state governments can, in many instances, deprive people

83. Military Selective Service Act of 1967, 50 U.S.C. app. § 460(b)(3) (1994).

84. *Oestereich*, 393 U.S. at 243-44 n.6.

85. See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-94 (1991); *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-42 (1987).

86. See *Roth v. Board of Regents of State Colleges*, 408 U.S. 564, 577 (1972) (holding property interest exists if law creates a reasonable expectation to a benefit).

87. See *Marbury*, 5 U.S. (1 Cranch) at 177.

of life, liberty, and property interests and nowhere be held accountable.

IV. CONCLUSION

In the past, on occasion, I have had my students in Constitutional Law or Federal Courts begin the semester by reading a copy of both the United States Constitution and the Stalin-era Soviet Constitution. The students always were surprised to see that the latter had a far more elaborate statement of individual rights. I also had students read a description of the abuses of human rights during the Stalin era.

The point, of course, was that what makes American law different is the availability of judicial review. No court could invalidate a government action in the Soviet Union. Judicial review is crucial to enforcing the American Constitution and all American law.

Alden v. Maine is inconsistent with this fundamental precept of American constitutionalism. The Court has preferred protecting government abuses of power over the ability of individuals to gain a remedy for violations of their rights. This is simply an unacceptable value choice in the American system of government.